

**SETH LEKELALU, ELIJAH MUALA AND NEWTON ZALE-v-GRAHAM SALE, ION GARA, OSCAR DEREVEKE AND PRESLY SOLOMON, AND IVAN REUBEN NGAI** (*Trading as Bukese Development Company*), **AND ELITE ENTERPRISES(S.I) LIMITED, AND ATTORNEY-GENERAL** (*Representing the Commissioner of Forest Resources and the Comptroller of Customs and Exercise*).

HIGH COURT OF SOLOMON ISLANDS  
**(Mwanasalua, J.)**

*Civil Case No. 208 of 2005*

**Hearing:** 12<sup>th</sup> August 2005

**Ruling:** 16<sup>th</sup> November 2005

*C. Ashley for the Plaintiffs*

*M. Bird for the First, Second and Third Defendants*

### **RULING**

**Mwanasalua, J:** There are two interlocutory applications before the Court. One is from the First, Second and the Third Defendants (the Defendants) and the other is from the Plaintiffs.

By summons filed on 8<sup>th</sup> August 2005, the Defendants seek the following orders –

1. The orders of the court dated 8<sup>th</sup> June 2005 be varied on the grounds set forth in the affidavits of Ivan Reuben Ngai and Philip Tiew sworn and filed on 4<sup>th</sup> August 2005.
2. That the Third Defendant be allowed to continue its logging activities on Toqasa Land.
3. That only the royalty portion of the proceeds of the exported round logs be deposited into a joint trust account in the names of the Solicitors for the parties.
4. That alternatively all proceeds of sale of round logs be deposited into a joint trust account in the names of the Solicitors of the parties.
5. costs to be in the cause.

The orders being sought by the Defendants arise from the orders of this court dated 8<sup>th</sup> June 2005, perfected, signed and sealed on 20<sup>th</sup> June 2005 and the consent order of the parties dated 8<sup>th</sup> July 2005, endorsed and sealed by the court.

The order of the court dated 8<sup>th</sup> June 2005, perfected, signed and sealed on 20<sup>th</sup> June 2005 is in these terms -

1. That the Second and Third Defendants together with their servants, agents and any persons authorized by them jointly and severally be restrained from carrying out any further logging operations within Toqasa Customary Land until further orders of the court; and
2. That all proceeds of logs felled from within Toqasa Land and exported to be restrained and paid into court until further orders of the court; and
3. That no deductions whatsoever shall be made from the proceeds under order No. 2 hereof until further orders of the court; and
4. The Provincial Police Commander and all police officers under his command immediately upon receipt of the order attend and enforce order No. 1 hereof using such force as is reasonably necessary for such purpose; and
5. A penal Notice attach to order No. 1 hereof; and
6. The Plaintiffs take reasonable steps to cause to serve the Writ of Summons, Statement of Claim, Ex parte Summons and Supporting Affidavit and Orders served on all the Defendants; and
7. The costs of and incidental to this application be reserved.

The consent order of the parties dated 8<sup>th</sup> July 2005, perfected, signed and sealed by the court is in these terms -

1. That the orders of this court dated 8<sup>th</sup> June 2005 and perfected, signed and sealed on 20<sup>th</sup> June 2005 are hereby varied;
2. That the First, Second and Third Defendants are hereby allowed to export all the felled logs from within the Toqasa Land;
3. That all the proceeds of the said sale of round logs from Toqasa Land to be made payable to the Plaintiffs' Solicitor's account upon clearance of letter of credit and other associated and related documents;
4. That the parties to the proceedings are at liberty to apply for further orders as are necessary in the circumstances;

5. Costs to be costs in the Cause.

The Summons by the Plaintiffs filed on 11<sup>th</sup> August 2005 seek the following orders –

1. That an Order be issued directing the Westpac Banking Corporation to release all proceeds of logs felled from within Toqasa Customary Land in compliance with paragraph 3 of the consent order of the parties dated and filed on 8<sup>th</sup> July 2005; and
2. That no deductions whatsoever shall be made from the proceeds under Order No. 1 hereof until further orders of the court; and
3. A Penal Notice attached to orders under paragraphs 1 and 2 hereof; and
4. The costs of and incidental to this application are in the Cause.

#### **The Summons by the Defendants**

The Defendants rely on the affidavits of Ngai and Tiew filed on 4<sup>th</sup> August 2005 in support of their application.

The facts derived from the affidavit of Ngai are that the Choiseul Provincial Executive (the CPE) made its timber rights determination on Toqasa Land (the determination) on 16<sup>th</sup> May 2003; the CPE displayed the Public Notice of the determination (the Public Notice) on 16<sup>th</sup> March 2003; Principal Magistrate Western issued the Certificate of No. Appeal against the determination on 24<sup>th</sup> July 2003 which was forwarded to the Commissioner of Forest Resources (the Commissioner) on 3<sup>rd</sup> March 2004; the Forestry Officer at Choiseul Bay forwarded the determination in Form 2 Certificate on Toqasa Land (the Form 2) to the Commissioner on 8<sup>th</sup> August 2003 and that the Commissioner issued Felling Licence No. 2/124 to the Second Defendant on 9<sup>th</sup> December 2004.

Ngai obtained the facts deposed to in his affidavit from copies of documents which he put into Court. Two of such documents were the Form 2 and the Public Notice. He was not the author of all the documents. They were signed by different people.

The facts derived from Tiew's affidavit are that the Third Defendant will extract 4,000M<sup>3</sup> of round logs from Toqasa Customary Land; that the Third Defendant would earn a monthly income of \$1,243,523.00 from the export of the \$4,000M<sup>3</sup> of round logs; the Plaintiffs made no undertaking as to the payment of damages; that the Third Defendant had been paying monthly expenses of \$566,800.00 to sustain the logging operation on Toqasa Land since the order of this court dated 8<sup>th</sup> June 2005 and that there are felled logs still lying in the bush on Toqasa Land.

There is no evidence to show that the Third Defendant had been paying monthly expenses of \$566,800.00 since 8<sup>th</sup> June 2005. Also, there is no evidence to show that felled logs are still lying in the bush. However, if such logs are still lying in the bush, then they should have been exported in accordance with paragraph 2 of the consent order dated 8<sup>th</sup> July 2005. It is hard to accept that the monthly expenses would constantly remain at the \$566,800.00 per month as the Third Defendant was restrained from carry out further logging operation on Toqasa Land from 8<sup>th</sup> June 2005. The Plaintiffs did not make any undertaking to pay damages for the reasons given by this court in its ruling dated 8<sup>th</sup> June 2005.

It is significant to note that the Form 2 was forwarded to the Commissioner on 8<sup>th</sup> August 2003 by the Forestry Officer at Choiseul Bay. It is part of the timber rights acquisition procedure that the original of the Form 2 be forwarded to the Commissioner by the CPE after it made the determination. The CPE did not appear to forward the original of the Form 2 to the Commissioner in this case.

Although not expressly stated, the summons by the Defendants was issued under order 30 of the High Court (Civil Procedure) Rules 1964, (the High Court Rules). The order sought in paragraph 2 of the Summons by the Defendants seeks to vary paragraph 1 of the court order dated 8<sup>th</sup> June 2005. This court has jurisdiction to vary its own orders under order 30, rule 11 of the High Court Rules. However, that jurisdiction is limited to the correction of clerical mistake or some error arising from any accidental slip or omission. This jurisdiction does not allow the court to vary the substance of its orders under rule 11.

The orders sought in paragraph 3 and 4 of the Summons by the Defendants seek to vary paragraph 3 of the Consent Order dated 8<sup>th</sup> July 2005. Its terms were agreed by the parties and signed by the Solicitors for the Plaintiffs, the First and the Second Defendants, the Fourth Defendant and the Third Defendant itself.

The Solicitor for the Plaintiffs contended that the order can only be varied by the agreement of the parties as it was a consent order.

The terms of the order did not oust the jurisdiction of the court to vary the order. In fact, there is provision in the order which allows the parties to apply for further orders as are necessary in the circumstances. In *Purcell v. FC Trigell Ltd.* [1970] 3 All ER. 671, Lord Denning MR Said at p.675:

**"The court has always a control over interlocutory orders. It may, in its discretion, vary or alter them even though made originally by consent."**

There is no evidence before the court on which to determine the variation of paragraph 3 of the Consent Order dated 8<sup>th</sup> July 2005. Further, Solicitor for the First, Second and Third Defendants did not address the court on whether the court would have jurisdiction to vary or alter the Consent Order.

### **The Summons by the Plaintiffs**

The order sought in paragraph 1 of the Summons by the Plaintiffs seeks to enforce paragraph 3 of the Consent Order dated 8<sup>th</sup> July 2005.

The Solicitor for the First, Second and Third Defendants contended that Westpac Banking Corporation would need to be joined as a party to this case before it can be ordered to comply with the previous orders of this court. There is material before the court which shows that the proceeds of the sale of the felled logs from Toqasa Land sold pursuant to paragraph 2 of the consent order were received by Westpac Banking Corporation on or about 29<sup>th</sup> July 2005. The First, Second and Third Defendants did not comply with paragraph 3 of the consent order since July 2005 after the sale of the logs.

### **Decision**

Ngai put into court copies of the Form 2 and the Public Notice which bear the date of 16<sup>th</sup> May 2003. The documents were put into court by Ngai in order to prove that the CPE published them on that date. I unable to use the documents for that purpose. The dates when these two documents were published need to be proved according to law.

There is nothing in the evidence of Ngai and Tiew which would justify the variation of the interlocutory order dated 8<sup>th</sup> June 2005. There is no evidence to vary this Order pursuant to order 30, rule 11 of the High Court Rules. Further, the consent dated 8<sup>th</sup> July 2005 will still stand.

The First, Second and Third Defendants made no attempt to comply with paragraph 3 of the Consent Order dated 8<sup>th</sup> July 2005 after the proceeds of the sale of the logs were received by Westpac Banking Corporation in July 2005. I will order Westpac Banking Corporation to pay the proceeds of the sale of the round logs into the Trust account of the Solicitor for the Plaintiffs in compliance with paragraph 3 of the Consent Order dated 8<sup>th</sup> July 2005 pursuant to Order 45, rule 25 of the High Court Rules.

The application by the First, Second and Third Defendants is dismissed. The application by the Plaintiffs succeeds.

### **Orders of the Court**

1. Application by the First, Second and Third Defendants dismissed;
2. Application by the Plaintiffs allowed;

3. Westpac Banking Corporation is directed to pay all proceeds of logs felled within Toqasa Customary Land into the Plaintiffs' Solicitors Trust account in compliance with paragraph 3 of the Consent Order of the parties dated and filed on 8<sup>th</sup> July 2005.
4. No deductions whatsoever shall be made from the proceeds under order No. 1 hereof until further orders of the court;
5. A Penal Notice attached to orders, under paragraphs 1 and 2 hereof;
6. The costs of and incidental to the Plaintiffs application are to be costs in the cause.

### **The Court**